Supreme Court, U.S.
FILED

941727 APR 10 1995

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NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JEREMY CALHOUN,

Petitioner

VERSUS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether there are genuine issues of material fact precluding summary judgment on the question of whether Jeremy Calhoun was an employee.

Whether a genuine issue of material fact exists as to the violation of the Louisiana child labor laws, LSA-R.S. 23:161 and LSA-R.S. 23:163.

The third question is whether the Fifth Circuit decision to dismiss TWT Moulding Company and Wall Moulding, Inc. violates Louisiana Civil Code Article 3492 which provides for interruption of prescription during minority or products liability suits.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the court below were Debra Haynes, individually and on behalf of Jeremy Calhoun, plaintiff; Jeremy Calhoun, plaintiff-appellant below and petitioner herein; St. Paul Fire and Marine Insurance Company, et al, defendants; and St. Paul Fire and Marine Insurance Company, TWT Moulding, Inc. and Wall Moulding, Inc., defendants-appellees below and respondent herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Jeremy Calhoun, the petitioner herein, prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 10, 1995.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit sought for review, affirm the district court's grant of summary judgment in favor of St. Paul Fire and Marine Insurance Company. A timely petition for rehearing was denied on January 10, 1995.

The judgment of the United States District Court for the Western District of Louisiana, unpublished, but printed in Appendix A of this petition on pages A-38 through A-39, granted summary judgment for St. Paul Fire and Marine Insurance

Company finding that Jeremy Calhoun is an employee of the gallery, therefore, St. Paul Fire and Marine Insurance Company is relieved of all liability. Petitioner's motion to reconsider was denied on January 10, 1995.

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 2101(c). The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 12, 1994. (Appendix, page A-1.) A timely Petition for Rehearing was denied on January 10, 1995. (Appendix, page A-3.)

STATUTES INVOLVED

LSA-R.S. 23:161, et seq.

LSA-R.S. 23:162

LSA-R.S. 23:163

Louisiana Civil Code Article 1799

Louisiana Civil Code Article 2315

Louisiana Civil Code Article 3462

Louisiana Civil Code Article 3468

Louisiana Civil Code Article 3469

Louisiana Civil Code Article 3492

28 U.S.C. 2101(c)

Rule 56(c), Federal Rules of Civil Procedure

STATEMENT OF THE CASE

The personal injury/product liability suit was filed in the United States District Court for the Western District of Louisiana on July 22, 1991, by Debra Haynes, individually and on behalf of her minor son, Jeremy Calhoun, pursuant to 28 U.S.C. 1332, diversity of citizenship, as a result of injuries sustained by Jeremy (age 16) while he was

operating a double miter saw owned by his grandparents while he was living with his grandparents. Upon reaching the age of majority, Jeremy Calhoun was substituted for Debra Haynes as party plaintiff in this matter.

Named as defendants in this suit were (1) St. Paul Fire and Marine Insurance Company (hereinafter referred to as "St. Paul"), general liability insurer of Jerry and Helen Haynes d/b/a Haynes Gallery of Monroe, which had in full force and effect a policy of insurance covering Haynes Gallery of Monroe, and (2) Dumas Brothers Machine, Inc. (hereinafter referred to as "Dumas Brothers"), as the manufacturer of the double miter saw which caused Jeremy's injuries. Plaintiff's suit against St. Paul Fire and Marine is based on the negligence of Haynes Gallery of Monroe in

(1) unlawfully employing a minor to operate a power-driven woodworking machine in violation of LSA-R.S. 23:161; (2) failing to provide supervision of a double miter saw; and (3) allowing a minor to operate the double miter saw in violation of LSA-R.S. 23:161.

Suit was filed against defendant, Dumas Brothers Machine, Inc., as the manufacturer of the double miter saw based on a metal plate attached to the saw containing the following inscription:

"TWT - double miter saw
by DU-MA-CO (Dumas Brothers)
Box 106
Lampasas, TX
512-556-5621"

As a result of interrogatories propounded to Dumas Brothers and an impleader action filed by Dumas Brothers on April 24, 1992, against TWT Moulding Company (hereinafter referred to as "TWT") and/or its successor in business,

Wall Moulding, Inc. (hereinafter referred to as "Wall"), plaintiffs learned that Dumas Brothers was not the manufacturer or designer or the miter saw in question, but rather, TWT Moulding Company and/or Wall Moulding, Inc. was the true manufacturer/designer. Dumas Brothers Machine, Inc. filed an impleader on April 24, 1992, joining defendants, TWT Moulding, Inc. and/or its successor in business, Wall Moulding, Inc., as third party defendants alleging it as the manufacturer and/or designer of the double miter saw alleged in plaintiff's complaint. Dumas Brothers stated that the double miter saw in question was made at the request of and pursuant to the instructions of TWT Moulding, Inc. of Brownwood, Texas. It is alleged that Wall Moulding, Inc. has assumed the business, assets, and liabilities of TWT

Moulding, Inc. and thus becomes liable for any amounts for which TWT Moulding, Inc. may be liable in this litigation. Plaintiff thereafter amended its original complaint joining as defendants TWT Moulding Company and Wall Moulding, Inc. as the manufacturer and/or designer of the double miter saw in question May 18, 1992.

Both St. Paul Fire and Marine Insurance Company and Dumas Brothers Machine, Inc., filed cross claims against each other and the remaining defendant, TWT Moulding Company and Wall Moulding, Inc.

A motion to dismiss was filed by TWT Moulding Company and Wall Moulding, Inc., alleging the running of prescription or statute of limitations (one year in Louisiana). Due to the prematurity of this motion, it was later withdrawn by

defendant, TWT Moulding Company and Wall Moulding, Inc.

St. Paul filed a motion for summary judgment. TWT and Wall filed memoranda in support of this motion, while plaintiff opposed such motion. Judge Walter ruled in favor of St. Paul on August 28, 1993, finding that Jeremy was an employee at the time of injuries and is excluded from coverage of the general liability policy of insurance maintained by St. Paul. Plaintiff filed a motion to reconsider, which was denied on September 24, 1993, Plaintiff thereafter filed a second motion to reconsider based on new evidence, which was also denied by Judge Walter on October 26, 1993. Judgment granting St. Paul's summary judgment was signed on December 17, 1993, and entered on December 20, 1993, Plaintiff filed his Notice of Appeal on January 10, 1994.

On October 14, 1993, after the judge ruled in favor of St. Paul on its summary judgment, TWT and Wall filed a motion to dismiss them from the suit. After reviewing memoranda filed by the parties, and the recommendation of the magistrate judge, Judge Walter ruled in favor of the dismissal and judgment was signed and entered on January 13, 1994. The judge's ruling was in disagreement with Magistrate Simon's recommendation. Plaintiff filed his Notice of Appeal timely on January 27, 1994.

The Court of Appeals for the Fifth Circuit, finding no reversible error, affirmed both district court orders in an opinion entered on December 12, 1994. Petition for Rehearing and Certification to the Louisiana Supreme Court was denied on January 10, 1995.

REASONS FOR GRANTING THE WRIT

A motion for summary judgment should be granted if, and only if, the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. Art. 966; Penalber v. Blount, 550 So.2d 577 (La. 1989); Caplan v. Pelican Homestead and Sav. Assn., 542 So.2d 622 (La.App. 5th Cir. 1989). The burden of proof in such a motion is on the mover to establish that there is no genuine issue of material fact. A fact is material if its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Gotto v.

ARA Living Center, 570 So.2d 1172 (La.App. 5th Cir. 1990). In the instant case, the question of employee versus grandparent/child relationship is a genuine issue of material fact. The second genuine issue of material fact is that the Louisiana Third Circuit has decided a similar case, Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989), but the lower courts make no reference to the child labor law issue in their decisions.

The court must test the efficacy of a motion for summary judgment by closely scrutinizing the mover's pleadings while treating those of the opposing party indulgently. Andras v. Maintenance Coastal Sales and Service Co., 572 So.2d 338 (La.App. 5th Cir. 1990). Any reasonable doubt as to the existence of material fact should be resolved against

mover in favor of full trial on the merits. Manders v. Singleton, 558 So.2d 772 (La.App. 5th Cir. 1990). The facts in the instant case are crystal clear. Jeremy Calhoun was not treated like any of the other employees of Haynes Gallery; no withholdings nor taxes were paid; payments/benefits were not conditioned on hours worked; no payment was made for the week before the accident, nor for the day of the accident; and, there were never any workers' compensation benefits paid. Therefore, a genuine issue of material fact exists requiring a full trial on the merits.

I. THE ISSUE OF CHILD LABOR LAWS VERSUS THE WORKERS' COMPENSATION AND TORT LAWS ARE SPLIT BY THE APPELLATE COURTS OF LOUISIANA.

The laws regulating employment of minors, commonly referred to as the child

labor laws, are found in Title 23 of the Louisiana Revised Statutes. Section 161 provides that:

> "Minors. . .shall not be employed, permitted, or suffered to work:
>
> * * *
>
> (8) In the operation of power-driven woodworking machines, or off-bearing from circular saws; . . ."

At the time of Jeremy's injuries, the laws also provided that no minor under the age of 16 years shall be employed, permitted, or suffered to work in any gainful occupation at any time, except as otherwise provided under the child labor laws. LSA-R.S. 23:162.

Section 163 further provides that:

> "No minor under the age of 16 years shall be employed, permitted, or suffered to work:
>
> * * *

(2) In, or about, or in connection with power-driven machinery.

(3) In any manufacturing or processing establishment, or in any manufacturing, mechanical, or processing occupation."

These laws were designed to protect minors of tender age from being employed in hazardous employments; and a father or tutor cannot prejudice or waive protection accorded by law. McLaughlin v. Boykin, 127 So.2d 86 (La.App. 1961). The legislature prohibiting employment of children under certain ages in or about power-driven machinery, motor vehicles, etc., had in mind the protection of children from accidents in prohibited fields. New Amsterdam Cas. Co. v. Soileau, 167 F.2d 767 (5th Cir. 1948), cert. denied, 335 U.S. 822, 69 S.Ct. 45, 93 L.Ed. 376.

Prior law precluded an injured minor employee from receiving workers' compensation benefits if injured in the course of performing duties in violation of the above law. Mott v. River Parish Maintenance, Inc., 432 So.2d 827 (La. 1983). The law today allows injured minors working in prohibited employment to receive workers' compensation benefits. Id.

In Mott, a minor was legally employed by defendant, but was later assigned to perform a task prohibited by the child labor law. The minor was injured during the performance of this prohibited task. The Louisiana Supreme Court found the injured minor to be covered by the Louisiana Workers' Compensation Act and that such benefits were his exclusive remedy against his employer.

Noble v. Blume Tree Services, Inc., 94 CW 0589 (La.App. 1st Cir. 1994), held that a minor who is hired in violation of child labor laws, but who is injured while performing tasks permitted by those laws, may not recover in tort, but is limited to workers' compensation as his exclusive remedy.

In Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989), a minor was illegally employed in logging operations and injured on the first day of the job. The court noted a distinction between (a) minors initially hired to perform prohibited employment, and (b) minors hired to perform legal employment and then later assigned to perform a prohibited task. In situation "b", where minors are hired in compliance with child labor law, but later assigned an activity

prohibited by the child labor law and injured while performing that activity for the employer, Mott controls limiting the injured employee's recovery to workers' compensation. In situation "a" where the minor is hired to perform work in violation of child labor law and injures himself, the injured party has the option to collect compensation benefits or proceed against his employer in tort. Jeremy Calhoun's claim is either compensation benefits or tort remedy as plaintiff's option in accordance with situation "a" and Ewert, since he was hired in violation of LSA-R.S. 23:161, et seq.

Jeremy Calhoun was under the age of 16 when he began working "in, or about, or in connection with power-driven machinery." His initial duties included sweeping and cleaning up around the shop,

including the area around the power-driven miter saw in violation of 23:163(2). These duties also violated 23:163(3) in that the gallery was a manufacturing or processing establishment because of the wood frames manufactured.

Louisiana Revised Statute 23:163 applies to Jeremy because he began performing duties around the gallery business for his grandparents prior to the age of 16. Section 163(2) prohibits minors under the age of 16 from being employed, permitted, or suffered to work in, about, or in connection with power-driven machinery, such as the power miter saw found in the gallery. Furthermore, even after attaining the age of 16, LSA-R.S. 23:161(A) prohibited Jeremy from being employed, permitted, or suffered to work in the operation of power-driven woodworking machines. The distinction

there seems to be that minors under the age of 16 are not allowed to work in any employment having anything to do with power-driven equipment. However, minors sixteen and over may work in employment associated with power-driven machines as long as the minor is not involved in the actual operation of the equipment. Thus, it would have been proper for Jeremy to sweep and clean up around the gallery once he reached 16 years of age, but prior to that time, he was prohibited from working at the gallery business because of the woodworking operations going on. As such, his employment at the gallery was totally prohibited at the time he began working at age 15 and became legal when he reached the age of 16, with the exception of his work performed in operation with the power-driven miter saw at the age of 16.

There are clear and unequivocal distinctions between Mott, Ewert, and Noble, that allow the court to have such a diverse view. In Mott, the court was faced with the controverse situation, i.e., a legally hired minor performing an illegal task at the time of his injury. However, in Noble, the court expressly declined to address the issue of coverage for an illegally hired minor stating:

> "A question has been raised as to whether there is a distinction between the case where the minor is hired in violation of law or where, as here, he is legally hired but required to perform a task in violation of law. While there may be some support for such a distinction, we are not here faced with that issue and express no view on it." Id. at 832 n5.

The Third Circuit, in Ewert, seized upon this footnote when faced with a case involving an illegally hired minor performing an illegal task at the time of

his injury. The court noted some states provide more liberal workers' compensation benefits to illegally employed minors, while others give the injured minor an option to claim workers' compensation or tort damages. Based on policy considerations, the court decided to allow minors to enforce or ignore the contract, at their option, by holding that an employment contract entered into in violation of the child labor law was relatively null. Thus, the plaintiff in Ewert, was allowed to annul the employment contract and proceed in tort.

Plaintiff contends that footnote [FN 6] in Mott "possibly overruled" Matthews v. Buff Hottle Shows, 109 So.2d 261 (La.App. 1st Cir. 1959), Messer v. Bagwell Coatings, 283 So.2d 279 (La.App. 1st Cir. 1973), and the other cases authorized by this court which hold that

the exclusive remedy of an illegally hired minor is workers' compensation. Id. The language of Mott, Noble, and Ewert, is clear and unequivocal. Each particular case deals with a separate issue of fact. In Mott, a minor was injured while performing a legal task even though illegally employed. In Noble, a minor was hired in violation of Louisiana child labor laws, but was injured while performing a task permitted by those laws. In Ewert, the minor was hired in violation of child labor laws, and was performing tasks prohibited by the child labor laws. The Jeremy Calhoun situated is hand-in-hand with Ewert in that Jeremy Calhoun was hired in violation of the child labor laws and was performing tasks that violated the child labor laws. In this instance, the Third Circuit decided to allow minors to

enforce or ignore the contract, at their option, by holding that an employment contract entered into in violation of the child labor laws is relatively null. Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989).

II. THE SECOND ISSUE OF JEREMY CALHOUN'S APPEAL IS THAT A GENUINE QUESTION OF FACT EXISTS AS TO WHETHER CALHOUN WAS AN EMPLOYEE AT THE TIME OF HIS ACCIDENT.

In the case at hand, the court is called upon to determine whether the relationship between Jeremy Calhoun, the minor grandson of Jerry and Helen Haynes d/b/a Haynes Gallery of Monroe, at the time of the accident, was that of an employer and employee and also whether or not at the time of the accident, if such a relationship existed, was Jeremy performing services arising out of and

incidental to his appointment in the course of his employer's business.

In the case of Arnold v. McConnell, 424 So.2d 402 (La.App. 2d Cir. 1982), the court quoted language from St. Paul Fire and Marine Insurance Company v. Richard, 208 So.2d 35 (La.App. 3d Cir. 1968), wherein the court, finding that the father was an employee of the son, commented:

> ". . .[t]here is no general test which can be applied in all cases to determine whether an employee/employer relationship exists. However, there must be a contract of employment, either express or implied, whereby the services are furnished with the understanding that payment will be made therefor."

The grandfather and grandmother did pay Jeremy Calhoun for the little work he did previous to the week and day of his accident, but not for the week before the accident and not for the day of the

accident. Further, the grandmother had provided room and board, clothes, and a vehicle for Jeremy's use, and it is submitted that the hours were simply a way to keep track of a due to/due from in a family relationship between a grandmother and grandson. Although Jeremy states that his grandmother would pay him $3.00 an hour, this is below minimum wage, there were no withholdings whatsoever, no deductions for employee expenses, and there were no workers' compensation benefits, nor was there any remuneration paid for the week before the accident, as well as the day of the accident. In Caldwell v. Caldwell, 55 So.2d 258 (La.App. 2d Cir. 1950), second rehearing, November 30, 1951, the court found that the son in a workers' compensation claim against his father had not satisfied to the court's satisfaction

the existence of the employer/employee relationship. The court believed that the payment by the father to the son was a substitution of a fixed weekly allowance that allowed the father to keep up with how much his son spent. In the Caldwell case, the father paid the son $35.00 a week and his board, laundry, and means of transportation. The court held in Caldwell that there was no employer/employee relationship and compensation was denied.

It is further submitted to the court that a genuine issue of material fact exists as to whether $3.00 an hour paid to the minor grandson by the grandfather and grandmother was anything more than weekly allowance or advancements on allowance and whether a true employer-employee relationship with a clear definition of control, hours, and

deduction of expenses was present. Reasonable minds could infer that there was nothing more than the grandmother taking care of her 16 year old grandson who lived with her at the time of the accident and had been living with her for some time prior to the accident.

There is also a genuine issue of material fact in the interpretation of St. Paul's policy as to whether coverage would be afforded to a 16 year old grandson who was injured by a power saw on the premises of the gallery/frameshop. The policy excludes employees who are paid workers' compensation and excludes an employer who is liable for workers' compensation. As discussed previously, the law gives Jeremy the choice to sue in tort, thereby releasing the Haynes for any liability under their workers'

compensation scheme. The policy does not exclude grandchildren of the insured. Further, no workers' compensation benefits were ever paid to or on behalf of Jeremy Calhoun.

In both of the above cited cases, Arnold and Caldwell, an injured minor was claiming to be an employee and thus entitled to workers' compensation benefits from the workers' compensation insurer of a parent. In both cases, the claimed compensation was deemed to be a weekly allowance unrelated to the work performed. As such, the minor child was not eligible for workers' compensation. Such is the situation here based on the facts which indicate that the $3.00 hourly paid to Jeremy was nothing more than an allowance by his grandparents, and thus, Jeremy would not be an employee under the workers' compensation scheme.

As such, he is entitled to and is afforded coverage under St. Paul's general liability policy issued to the Haynes.

Under 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The lower court stated that the issue before them was whether there is an issue of material fact as to Jeremy Calhoun's status as an employee of the gallery. If no issue of fact exists as to Jeremy being an employee of the gallery, then the exclusions apply and St. Paul is entitled to summary judgment

as a matter of law. The court found that an employee-employer relationship did exist between Jeremy and the gallery, citing the case of Ermert v. Hartford Insurance Company, 559 So.2d 467, 476 (La. 1990).

Plaintiff submits that it is disputed as to whether he was an employee of the gallery at the time of the accident, and as such, the matter is inappropriate for summary judgment,

A fact is "material" for purposes of summary judgment if it potentially ensures or precludes recovery, if it affects litigants' ultimate success, or if it determines the outcome of the case. Penalber v. Blount, 550 So.2d 577, 583 (La. 1989). Whether or not Jeremy was an employee of the gallery at the time of the accident falls within the above criteria and is thus a "material" fact.

Respondent, St. Paul, suggested that the following four factors are used to determine employment status:

1. Selection and engagement;
2. Payment of wages;
3. Power of dismissal; and,
4. Control.

However, in Newcomb v. North East Insurance Company, 721 F.2d 1016 (5th Cir. 1983), and Arledge v. Royal-Globe Insurance Company, 401 So.2d 615 (La.App. 3d Cir. 1981), the courts have held that no single factor is determinative as to the existence of a master-servant relationship.

Louisiana jurisprudence favors jury resolution of questions for which no single answer is compelled. Newcomb v. North East Insurance Company, 721 F.2d 1016 (5th Cir. 1983). The issue in Newcomb involved a determination as to

whether one of the parties to the suit was an independent contractor or an employee of another one of the parties. Although our issue involves a determination as to whether Jeremy Calhoun was an employee of Haynes Gallery or merely a grandson performing duties and chores for his grandparents and receiving an allowance, the analysis discussed in Newcomb is applicable.

While the Fifth Circuit Court of Appeals found that the right of the employer to control the employee in his performance of assigned tasks evidences a master-servant relationship, they also indicated that no single factor is determinative as to the existence of a master-servant relationship. Newcomb, 721 F.2d at 1017.

In Newcomb, the alleged employee owned and maintained his own truck and

carried his own liability insurance. The alleged employer did not carry the alleged employee on its payroll or deduct income or social security taxes from his pay. The alleged employer did not obtain workers' compensation insurance or pay unemployment taxes on account of the alleged employee. The alleged employer did not dictate the time of day that the alleged employee was to work. Direct supervision or immediate control of the alleged employee was slight.

In the instant case, the grandparents did not deduct income or social security taxes from Jeremy's pay, nor were there any payroll records for Jeremy Calhoun. Haynes Gallery did not obtain workers' compensation insurance to cover Jeremy. Jeremy did not have fixed hours to work, he worked when he pleased. Jeremy was not supervised other than

being provided with a list each day that he reported to the gallery as to what order to fill. His grandparents provided room and board, a vehicle for transportation, bought his clothes, paid for his school supplies, and gave him an allowance based on $3.00 an hour, well below the minimum wage.

The Fifth Circuit further discerned, based on Louisiana jurisprudence, that: (1) when there is a dispute over the actual powers of control possessed by the alleged employer, a question of fact is posed which must be submitted to the jury unless reasonable and fair-minded persons could reach but one conclusion; (2) when the powers of control are undisputed, and there exist no contrary signals as to the nature of the relationship, the question is one of law, properly to be resolved by the judge; and, (3) when the powers of

control are not in dispute, but there are other signals as to the nature of the relationship, the question is one of mixed law and fact, to be submitted to the jury unless reasonable and fair-minded persons could reach but one conclusion. Newcomb, 721 F.2d at 1918-19. (Emphasis added.)

Petitioner submits that the Haynes did possess some control over Jeremy. They were his grandparents and quasi-guardians since Jeremy resided with them. They provided his room, board, and transportation. In addition, they provided the list of work to be done by Jeremy when he returned from school each day. On the other hand, there are facts present which indicate that the Haynes intended something other than a master-servant relationship. These facts include: Jeremy assisting his grand-

parents at the gallery when he wanted to; he did not assist or help if he didn't want to; his grandparents paid him only $3.00 an hour for any work that he did; no income or social security taxes were deducted; and workers' compensation was not procured for Jeremy. These are "other signals" which indicate that Mr. and Mrs. Haynes and Jeremy viewed the relationship as that of a guardian-grandson relationship rather than one of master-servant. These "other signals" are such that the issue in this case becomes one of mixed law and fact, to be submitted to the jury since reasonable and fair-minded persons could conclude that a master-servant relationship did not exist.

Whether the Haynes formally employed Jeremy or not, they did permit or suffer him, while he was a minor, to work in, or

about, or in connection with a power-driven miter saw. This is a violation of the statute and is a form of "fault" under Louisiana Civil Code Article 2315.

III. THE THIRD ISSUE IS WHETHER PRESCRIPTION HAS RUN AGAINST TWT AND WALL.

At the time of petitioner's accident and injuries, Louisiana Civil Code Article 3468 provided that:

> "Prescription runs against absent persons and incompetents, including minors . . .unless exception is established by legislation."

Louisiana Civil Code Article 3492 reads as follows:

> "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

Louisiana Civil Code Article 3462, in part, reads as follows:

> "Prescription is interrupted . . .when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. . ."

and Louisiana Civil Code Article 1799 reads as follows:

> "The interpretation of prescription against one solidary obligor is effective against all solidary obligors and their heirs."

The above four articles provide that Jeremy, even though a minor, had a one year time period within which to bring an action against his obligors. However, his suit against Dumas Brothers and St. Paul, filed within the one year time period, interrupted prescription against other solidary obligors, TWT and Wall, such that the joinder of TWT and Wall to this action on May 18, 1992, was proper.

In 1992, the Louisiana legislature amended Louisiana Civil Code Article

3492, adding a third sentence. The entire article now reads as follows:

> "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing products liability actions in effect at the time of the injury or damage."

This amendment to LSA-C.C. Article 3492 provides a legislative exception to the general rule stated in LSA-C.C. Article 3468 that prescription runs against minors. As a result, the prescription period for a products liability action accruing after the effective date of this amendment is one year after the minor reaches the age of majority.

Prescriptive laws are remedial in nature, and are generally accorded retroactive, as well as prospective, application. Small v. Avoyelles Parish Police Jury, 589 So.2d 1132 (La.App. 3d Cir. 1991), writ denied, 593 So.2d 373 and 593 So.2d 374.

Because the suit filed timely against Dumas Brothers and St. Paul interrupted the prescription running against TWT and Wall, Jeremy's cause of action against TWT and Wall had not prescribed at the time of Jeremy's amended complaint joining them as defendants. Thus, the amendment to Article 3492 applies retroactively to this suit. (Emphasis added.)

A statute setting forth a period of limitations, which does not otherwise alter substantive rights, applies to pending cases. Cooper v. Diamond M Co.,

799 F.2d 176, 178 (5th Cir. 1986), cert. denied, 481 U.S. 1048, 107 S.Ct. 2177, 95 L.Ed.2d 834; Friel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985). This is so, even though the claim accrued prior to the statute's date of passage. Id. While Jeremy's case of action arose in December, 1990, prior to the amendment to Article 3492, the statement is applicable.

When a new law alters the period of prescription, whether it makes it shorter or longer, the doctrine of "proportionate prescription" is applicable. U.S. v. Nebo Oil Co., 90 F.Supp. 73 (W.D.La. 1950), affirmed, 190 F.2d 1003. This rule states that the time which preceded the change is to be reckoned according to the ancient law, and that which followed according to the new law. Henson v. St. Paul Fire & Marine Insurance Co., 354

So.2d 612 (La.App. 1st Cir. 1977), writ granted, 356 So.2d 1006, affirmed and remanded, 363 So.2d 711.

The amendment to the prescriptive period is applicable to any causes of action occurring before the effective date of the statute when the claim was not prescribed on the effective date of the statute and the claim was made before prescription ran. See Doyle v. St. Patrick Hospital, 499 So.2d 704 (La.App. 3d Cir. 1986), writ denied, 503 So.2d 478.

Prior to the amendment to Article 3492, the Louisiana Civil Code provided a one year prescriptive period to plaintiff's cause of action. In applying the amendment of Article 3492 to this case, jurisprudence instructs us to consider the time that ran prior to the amendment. The old law allowed time to run against

the minor, but Article 1799 allowed the filing of suit against a solidary obligor to interrupt prescription against TWT and Wall, such that prescription had not run against them prior to the amendment.

The time period after the amendment is to be considered according to the new law which tolls prescription during minority. Since suit was filed against TWT and Wall prior to Jeremy's 19th birthday, the requirements of the new amendment are met and his claim has not prescribed.

As stated above, the only limitation upon applying this amendment to this matter is whether such application would revive an already prescribed action or strip a party of a vested right. Hall v. Hall, 516 So.2d 119 (La. 1987). In Hall, a minor child was sexually abused before and during 1979. Suit was not brought

during the one year liberative prescription period. The legislature amended Article 3469 in 1983, suspending prescription until the minor reached the age of majority. Suit was brought after this amendment. The Louisiana Supreme Court dismissed the suit because the cause of action had prescribed in 1980 prior to the amendment in 1983. Upholding the suit would have revived an already prescribed action.

The facts in the present case are vastly different; this suit was brought within the one year time period, albeit not against the defendants, TWT and Wall, but against Dumas Brothers, Inc. Because Article 1799 interrupted the prescription running against TWT and Wall, plaintiff's suit against them had not prescribed. As such, upholding this suit against TWT and Wall under the amended Article 3492 does

not revive a prescribed claim as in Hall.

TWT and Wall did not have a vested right at the time of their addition to this suit, thus they are not being stripped of any rights by requiring them to stay in this suit. The only effect of applying the amendment to TWT and Wall is that the prescriptive period which has been interrupted by the filing of suit against the other co-defendants (Dumas Brother and St. Paul, as insurer of the bankrupt grandparents), remains interrupted, even after these other co-defendants are later dismissed.

The events leading up to TWT and Wall's joinder in this suit as defendants is necessary to fully appreciate the following argument. Jeremy Calhoun was injured on December 20, 1990. Suit was timely filed against St. Paul and Dumas Brothers Machine, Inc. on July 22, 1991.

Dumas Brothers Machine, Inc. was named as the manufacturer of the alleged defective saw based on a metal plate attached to the saw containing the following inscription:

TWT - double miter saw
by DU-MA-CO (Dumas Brothers)
Box 106
Lampasas, TX
512-556-5621

On April 24, 1992, Dumas Brothers filed an impleader action against TWT and/or its successor in business, Wall Moulding, Inc., as the manufacturer and/or designer of the miter saw in question. Shortly thereafter, plaintiff received answers to interrogatories from Dumas Brothers indicating that the saw was "fabricated by Dumas Brothers Machine and Ironworks, a partnership for TWT Molding, Inc," As a result, plaintiff

amended his original complaint on May 18, 1992, adding the defendants, TWT and Wall.

On the face of complaint, plaintiff's claims would seem to be prescribed since suit was filed against TWT and Wall more than one year after his cause of action occurred. However, suit was not bought against them originally because of the misleading metal plate affixed to the saw. TWT, an alleged partnership of Dumas Brothers Machine and Ironworks, affixed a misleading nameplate to its saw. Such action prevented plaintiff from discerning the true identity of the designer of the saw and caused plaintiff to sue an innocent party. Suit would have originally been brought against them but for this custom in having the misleading name imprinted on the plate affixed to the miter saw.

CONCLUSION

The basis of Jeremy Calhoun's opposition is that he is not an employee of his grandparents. However, if he is an employee, then his employment was in violation of the child labor law and under the rationale of Ewert, he is entitled to proceed against his employer's liability carrier under tort law.

The legislature has given special protection to minors employed in dangerous activities and employers taking advantage of minor employees for the performance of these dangerous activities are responsible under tort law. Given the fact that the legislature has given special protection to minor employees and that the courts have further protected these minor employees and taken tort

immunity away from the employers in violation of the child labor laws, Jeremy requests this Court to reverse the decision of the lower court.

This Honorable Court is requested to reverse the trial court's decision dismissing Jeremy Calhoun's claims against St. Paul on the basis of:

(1) A violation of the Louisiana child labor law, particularly LSA-R.S. 23:161-163;

(2) The relationship of grand-parents/grandchild vis-a-vis employers/ employee; and,

(3) The rationale found in Ewert v. Georgia Casualty & Surety Co., 548 So.2d 358 (La.App. 3d Cir. 1989), involving minors working around certain dangerous machinery.

The second request is to reverse the trial court's decision dismissing TWT and

Wall. The timely suit against Dumas Brothers and St. Paul, as insurer of the grandparents Haynes, interrupted the running of prescription. Because the Haynes had gone into bankruptcy, plaintiff could not sue them, but a suit against their insurer interrupts prescription as to all joint tortfeasors. The manufacturer of the miter saw is a joint tortfeasor of the Haynes. Thereafter, the amendment of Civil Code Article 3492 providing for the interruption of prescription during the minority of Jeremy further precluded the running of prescription against TWT and Wall. The dismissal of Dumas Brothers and/or St. Paul no longer has any effect on the status of TWT and Wall. Reversing the lower court decision and requiring TWT and Wall to continue as parties in this matter will not revive any

prescribed action, nor will it strip TWT and Wall of any vested right. Furthermore, considering the misleading inscription on the metal plate affixed to the allegedly defective saw and TWT and/or Wall's involvement regarding the fixation of this misleading inscription, should preclude any dismissal on the grounds of prescription.

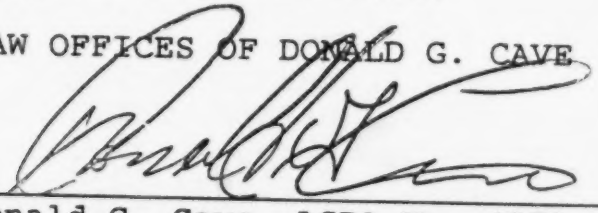
In addition to reversing the judgment in favor of St. Paul, this Court is requested to reach a reversal of the trial court's dismissal of defendants, TWT Moulding Co, and Wall Moulding, Inc., on the basis of Civil Code Article 3492 and the fact that the defendants' inscription on the saw mislead the plaintiff, as well as the timely claim against St. Paul, as insurer of the bankrupt grandparents. In Louisiana, a

suit against the insurer of the tortfeasor interrupts prescription against the tortfeasor.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

LAW OFFICES OF DONALD G. CAVE



Donald G. Cave, LSBA No. 4073
5721 South Sherwood Forest Blvd.
Baton Rouge, LA 70816-6034
Telephone: 504/292-3194

April 6, 1995.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by placing a copy of same in the United States mails, postage prepaid and properly addressed to:

Mr. Haynes L. Harkey
HAYES, HARKEY, SMITH, CASCIO & MULLENS
Post Office Box 8032
Monroe, LA 71211-8032

Ms. Elizabeth Erny Foote
PERCY, SMITH & FOOTE
Post Office Box 1632
Alexandria, LA 71209-1632

Baton Rouge, Louisiana, this 6th day of April, 1995.

Donald G. Cave

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40071

U.S. Court of Appeals
FILED
Dec. 12 1994
CHARLES R. FULBRUGE III
CLERK

DEBRA HAYNES, Individually & obo Jeremy Calhoun,

Plaintiff

JEREMY CALHOUN,

Plaintiff-Appellant,

versus

ST. PAUL FIRE & MARINE INSURANCE CO., ET AL,

Defendants,

ST. PAUL FIRE & MARINE INSURANCE CO., TWT MOULDING, INC. and WALL MOULDING, INC.,

Defendants-Appellees.

Appeals from the United States District Court for the Western District of Louisiana
(91-CV-1516)

Before POLITZ, Chief Judge, GARWOOD AND BENAVIDES, Circuit Judges.

PER CURIAM:*[1]

Debra Haynes, individually and on behalf of the minor Jeremy Calhoun, appeals an adverse summary judgment in favor of St. Paul Fire & Marine Insurance Co., and the dismissal on prescription basis of her claims against TWT Moulding, Inc. and Wall Moulding, Inc. Having considered the briefs and oral arguments of counsel and the pertinent parts of the record, and finding no reversible error, the judgments appealed are AFFIRMED in all respects.

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40071

U.S. Court of Appeals
FILED
Jan 10 1995
CHARLES R. FULBRUGE III
CLERK

DEBRA HAYNES, Individually &
obo Jeremy Calhoun,
Plaintiff,
JEREMY CALHOUN,
Plaintiff-Appellant,

versus

ST. PAUL FIRE & MARINE INSURANCE
CO., ET AL,
Defendants,
ST. PAUL FIRE & MARINE INSURANCE
CO., TWT MOULDING, INC., and WALL
MOULDING, INC.,
Defendants-Appellees.

Appeals from the United States
District Court for the Western
District of Louisiana

ON PETITION FOR REHEARING

(January 10, 1995)

Before POLITZ, Chief Judge, GARWOOD and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied in all things.

ENTERED FOR THE COURT:

s/ Fortunato P. Benavides
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
AUG 30 1993
ROBERT H. SHEMWELL, CLERK
BY s/ SJD
Deputy

DEBRA HAYNES, INDIVIDUALLY AND ON BEHALF OF JEREMY CALHOUN,
plaintiffs

CIVIL ACTION
NO. 91-1516

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND DUMAS BROTHERS MACHINE, INC.,
defendants

SECTION "M"
JUDGE WALTER

MEMORANDUM RULING AND ORDER

Pending before this court is Defendant St. Paul Fire and Marine Insurance Company's motion for summary judgment. Plaintiff Jeremy Calhoun and

Debra Haynes oppose this motion. For the reasons that follow, defendants motion for summary judgment is GRANTED.

Plaintiff Jeremy Calhoun is the grandchild of Jerry and Helen Haynes. The Haynes' own and operate the Haynes Gallery, a frame shop in Monroe, Louisiana. Jeremy was 16 and had been working at the Gallery for approximately 2 years. He was paid $3.00 and [sic] hour and was at the Gallery on a regular, part-time basis. One of Jeremy's responsibilities while at the Galley [sic] was to cut moulding to be assembled into frames. This suit arose when Jeremy severely injured his hand while using a saw to cut some moulding.

St. Paul Fire, who provided a comprehensive general liability policy on the Gallery was named as a defendant.

St. Paul has moved for summary judgment dismissing plaintiff's suit against it. The basis of St. Paul's contentions is that, although St. Paul provided a general commercial liability policy on the Gallery, an exclusion in the policy provides that the St. Paul policy does not cover injuries to employees arising in the course and scope of the business. The exclusion, found on page 26 of the policy, provides as follows:

> **EMPLOYERS LIABILITY.** We won't cover:
>
> *Bodily injury to any employee of the protected person for which the protected person may be held liable as an employer or in any other capacity, such as property owner or product manufacturer. ...

St. Paul also submits that another exclusion in the policy also applies:

> **Workers' compensation.** We won't cover any obligation that the protected person has under

> workers' compensation, disability benefits or unemployment compensation law, or any similar law.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The United States Supreme Court has held that according to the plain language of Rule 56(c), entry of summary judgment is proper

> ...after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a

> situation, there can be no genuine issue as to any material fact, since a complete element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is entitled to judgment as a matter of law because the non-moving party has failed to make a sufficient showing of an essential element of her case with respect to which she has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

The issue before the court, then is whether there is an issue of material fact as to Jeremy Calhoun's status as an employee of the Gallery. If no issue of fact exists as to Jeremy's being an employee of the Gallery, than [sic] the exclusions apply and St. Paul is entitled to summary judgment as a matter of law.

Jeremy was paid $3.00 an hour for his work. He was paid regularly on Fridays, and a record of his hours was

kept on time cards. His particular duties while at the shop were assigned to him by either Mr. Haynes or Mrs. Haynes, owners and operators of the Gallery.

Plaintiffs have opposed this motion by submitting that there is an issue of fact as to whether the $3.00 an hour paid to Jeremy, since it was below minimum wage, when coupled to the fact that no deductions were taken from his pay, was actually a weekly allowance paid by the grandparents to the grandson, since Jeremy was living with the grandparents at the time. To support their position, plaintiffs cite to Caldwell v. Caldwell, 55 So.2d 258 (La.App. 2d Cir. 1950), in which the court of appeals found that an employer-employee relationship did not exist between a father and a son. This claim is without merit. In Caldwell, the

father paid the son a fixed weekly allowance and the son's board, laundry, and transportation. In the instant case, the amount of money Jeremy would receive was based entirely on the amount of time he would spend working at the Gallery, less any advances. Clearly, there was an employee-employer relationship between Jeremy and the Gallery. See Ermert v. Hartford Insurance Company, 559 So.2d 467, 476 (La.1990).

Plaintiffs also submit that since Jeremy had not in fact received any workers' compensation benefits for his injury, the exclusions do not apply. This contention misses the point of both the general liability policy and the exclusions. The policy is designed to protect the Gallery from liability to third parties injured on the premises,

not to protect employees from job-related injuries. Employees are protected by both the workers' compensation statutes and specific workers' compensation policies. Payment in fact of benefits is not required; all that is needed for the exclusion to apply is liability as an employer. As discussed above, such is the posture of the present case. See also LSA-R.S. 23:1021, et seq.

The plaintiffs have failed to controvert any of the defendant's evidence. Because there is no genuine issue as to any material fact, defendant St. Paul Fire and Marine Insurance Company is entitled to judgment as a matter of law.

Judgment in accordance with this Memorandum Ruling will be signed upon presentation to the Court.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 28 day of August, 1993.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 08/30/93
BY sjd
TO: Baldwin
Harkey
Cave
Foote

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
SEPT 24 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ BP
Deputy

DEBRA HAYNES, INDIVIDUALLY AND ON BEHALF OF JEREMY CALHOUN,
plaintiffs

CIVIL ACTION
NO. 91-1516

versus

ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND DUMAS BROTHERS MACHINE, INC.,
defendants

SECTION "M"
JUDGE WALTER

MEMORANDUM RULING AND ORDER

Before the Court is plaintiff Jeremy Calhoun's motion to reconsider judgment.

Defendant St. Paul Fire and Marine Insurance Company originally filed a

motion for summary judgement. Plaintiff filed a timely opposition on August 2, 1993. Pursuant to a motion granting 20 days to reply to the opposition of the plaintiff, defendants filed a reply memorandum on August 13. On August 28 this Court granted the motion for summary judgement. Plaintiff Jeremy Calhoun now seeks to have this court reconsider that decision. The basis for the motion to reconsider is "plaintiff's belief that the Court rendered its decision prior to its receipt of the Reply Memorandum." The "Reply Memorandum" was filed on August 27.

This Court is quick to note that the "Reply Memorandum" at issue is not the initial memorandum filed in opposition to the motion. The "Reply Memorandum" is plaintiff's response to the defendant's

reply to the plaintiff's opposition to the motion for summary judgment. There is no provision in the local Rules of Court for such a pleading, and there is nothing in the record indicating that the plaintiff was granted leave of court to file this document.

Beyond this, it is abundantly clear from the text of the Memorandum Ruling handed down by this Court that the opposition filed by plaintiff was considered and addressed by this Court. Each submission by both plaintiffs and the defendant was weighed; nothing was ignored.

Plaintiff's motion is denied.

ORDER

IT IS ORDERED that the motion to reconsider filed by plaintiff Jeremy Calhoun is DENIED.

THUS DONE AND SIGNED this 24 day of Sept., 1993, Shreveport, Louisiana.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT
DATE 09/27/93
BY sjd
TO: Baldwin
Harkey
Cave
Foote

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
OCT 26 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ cag
DEPUTY

DEBRA HAYNES,
INDIVIDUALLY AND
ON BEHALF OF
JEREMY CALHOUN
plaintiffs

versus

ST. PAUL FIRE AND
MARINE INSURANCE
COMPANY AND DUMAS
BROTHERS MACHINE,
INC.
defendants

CIVIL ACTION
NO. 91-1516

SECTION "M"
JUDGE WALTER

MEMORANDUM RULING AND ORDER

Before the Court is plaintiff Jeremy Calhoun's second motion to reconsider judgment. Plaintiff's motion is again denied.

Originally, defendant St. Paul Fire and Marine Insurance Company filed a motion for summary judgment. Despite an opposition by the plaintiff, the motion was granted. Plaintiff filed a motion to have this court reconsider that order. The motion was denied.

Plaintiff has now filed another motion seeking to have the original order dismissing defendant, St. Paul Fire reconsidered. This motion is based on an affidavit from the accountant for the Haynes Gallery. The affidavit provides that plaintiff Jeremy Calhoun did not receive either a W-2 form or a 1099 form from the Gallery, although other people who worked there did. This is submitted to raise an issue of fact as to Jeremy's status as an employee.

Plaintiff's motion is denied. As set out in the original order of this court, there is no question as to the fact that Jeremy worked at the Gallery, was given Gallery-related duties to perform, and was paid regularly based solely on the amount of hours he spent at the Gallery, less any advances. He was an employee of the Gallery.

ORDER

IT IS ORDERED that the second motion to reconsider filed by plaintiff Jeremy Calhoun is DENIED.

THUS DONE AND SIGNED this 25 day of Oct., 1993, Shreveport, Louisiana.

s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

COPY SENT

DATE 10-26-93
BY cag
TO: Baldwin
Harkey
Cave
Foote

UNITED STATES DISTRICT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
NOV 15 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ tw
DEPUTY

DEBRA HAYNES,
ET AL,
Plaintiffs — CIVIL ACTION

VERSUS — NUMBER CV91-1516-M

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ET AL,
Defendants — JUDGE WALTER
MAGISTRATE JUDGE SIMON

RECOMMENDATION ON MOTION TO DISMISS

Before the Court is a motion to dismiss on the ground of prescription, filed by TWT Moulding Company ("TWT") and Wall Moulding, Inc. ("Wall"). Movants contend that Louisiana's liberative prescription on tort claims of one year bars plaintiffs' recovery against them.

The plaintiff, now Jeremy Calhoun, alleges that on or about December 20, 1990, when he was sixteen years of age, while operating a double miter saw in an art gallery owned by his grandparents in Monroe, Louisiana (hereinafter "the gallery"), the thumb and fingers of his left hand were amputated and severely injured by the saw, because the saw was an unreasonably dangerous product.

The plaintiff originally named Dumas Brothers Machine, Inc., as a defendant, alleging that that company was the manufacturer of the saw and responsible for Jeremy's damages. In addition, the plaintiff sued St. Paul Fire & Marine Insurance Company (hereinafter "St. Paul") as the comprehensive general liability insurer of the gallery, alleging liability of the gallery because

it unlawfully employed Jeremy, a minor, to operate a power-driven woodworking machine in violation of Louisiana law.

On April 24, 1992, Dumas filed a third party demand against TWT and Wall, alleging that the saw in question was made at the request of and pursuant to the instructions of TWT and Wall. Then on May 18, 1992, the plaintiff substituted TWT and Wall as defendants in place of Dumas Brothers Machine, Inc., and on the dame [sic] date, St. Paul filed a cross-claim against Dumas, TWT and Wall for indemnity or, alternatively, contribution. Then on May 27, 1992, Dumas filed a cross-claim against TWT, Wall and St. Paul.

On September 21, 1992, Dumas filed a motion for summary judgment on the ground that Dumas did not manufacture the

subject saw, and that motion was granted by Judge Walter on February 5, 1993. The plaintiff did not oppose the dismissal of Dumas, but TWT and Wall opposed it, alleging that Dumas' name appeared on a plate on the saw in question, and that the fact that that name appeared on the saw created a genuine issue of material fact as to whether Dumas had manufactured the saw. Judge Walter's opinion noted that Dumas had not admitted that its name was on the saw, and that in answers to interrogatories, Dumas reiterated that it had never manufactured, assembled or marketed the saw in question, and that no one had come forward with any affirmative evidence or information to dispute that statement, and granted summary judgment to Dumas. However, Judge Walter declined to certify this summary judgment as a

final judgment under Rule 54(b) of the Federal Rules of Civil Procedure (Docket Items 50 & 52).

On June 25, 1993, St. Paul moved for summary judgment in its favor on the ground that its policy of insurance excluded coverage for injuries to employees of the gallery arising in the course and scope of the business. Judge Walter held that there was an employee-employer relationship between Jeremy and the gallery, that the plaintiffs had failed to show any genuine issue as to any of the material facts underlying that conclusion, so that St. Paul was entitled to judgment as a matter of law (Docket Item #63). Jeremy Calhoun filed two motions seeking to have Judge Walter reconsider his decision as to St. Paul's dismissal, both of which were denied.

The last denial was signed by Judge Walter on October 25, 1993, but the record does not show that any judgment was ever signed pursuant to the granting of the summary judgment to St. Paul.

At the time of the plaintiff's accident, Art. 3492 of the Louisiana Civil Code provided, in pertinent part, as follows:

> "Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."

Jeremy Calhoun alleges that he was injured on December 20, 1990, and he did not file suit against TWT and Wall until May 19, 1992. Therefore, the plaintiff's claims against TWT and Wall would have prescribed before they were sued unless the prescription running against them was interrupted by the filing of suit against

Dumas or St. Paul. Louisiana Civil Code Art. 1799 provides that "the interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs."

The movants contend that the originally named defendants in this suit, Dumas and St. Paul, are no longer defendants in the suit, having been dismissed by separate orders and/or judgments, and that since there are no defendants with whom TWT and Wall could be solidarily liable, the plaintiffs' claims against TWT and Wall should be dismissed as having prescribed.

Plaintiff contends that prescription against TWT and Wall was interrupted when suit was filed against Dumas and St. Paul, because those original defendants were solidary obligors with TWT and Wall,

and that no further prescription ran against TWT and Wall before the date that they were named as defendants in the suit. The plaintiff's contention is correct only if either Dumas or St. Paul actually is a solidary obligor with TWT and Wall, and the answer to that "if" is not yet final.

Judge Walter dismissed Dumas because it denied being the manufacturer or seller of the saw that is the subject of the suit, and no other party had provided any evidence in dispute of that claim. If Dumas, indeed, had no connection with the product which allegedly caused the plaintiff's injury, then Dumas could not be liable to the plaintiff, and, therefore, could never have been a solidary obligor with TWT and/or Wall.

Judge Walter dismissed St. Paul on a finding that St. Paul did not provide insurance to the plaintiff's grandparents for any alleged liability they may have to the plaintiff because the plaintiff was working in the course and scope of employment by his grandparents at the time of his alleged accident, and the policy excluded coverage for liability under such circumstances. If, indeed, the plaintiff was working in the course and scope of his employment for his grandparents at the time of the accident, then St. Paul could not be liable to the plaintiff, and, therefore, could never have been a solidary obligor with TWT and/or Wall.

At this point in the case, however, neither the judgment dismissing the plaintiffs' suit against Dumas nor the

Court's ruling that St. Paul is entitled to judgment as a matter of law, have become final.

Rule 54(b) of the Federal Rules of Civil Procedure provides that when multiple parties are involved in an action, and the court adjudicates the claims of less than all of the parties, unless the court directs the entry of final judgment as to the claims adjudicated, upon an express determination that there is no just reason for delay, and upon an express direction for the entry of a final judgment, then the order or judgment shall not terminate the action as to any of the claims or parties, and the order or the form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims and the

rights and liabilities of all of the parties.

In the case at bar, Dumas specifically sought to have Judge Walter direct the entry of a final judgment as to the dismissal of Dumas, but Judge Walter declined to do so. No judgment yet appears in the record with regard to the dismissal of the plaintiffs' claims against St. Paul.

Even if Judge Walter were to direct the entry of final judgment dismissing Dumas or St. Paul, that would mean that such judgment could be immediately appealed to the Fifth Circuit, and if it were appealed it would still not be final.

Since the dismissals of Dumas and St. Paul are not final, and are subject to revision, there is no certainty that

Dumas and St. Paul will not later be found to be solidary obligors with TWT and Wall. That uncertainty, of course, precludes dismissal of TWT and Wall at this time on the ground of prescription.

The plaintiff also contends that his claims against TWT and Wall have not prescribed because his amended complaint relates back to the date of the filing of his original complaint under Federal Rule of Civil Procedure 15(c).

First of all, it is not necessary to address that claim because of the lack of finality on the issue of possible solidary liability of TWT and Wall with the other parties.

Second, the plaintiff has not presented any evidence to show that TWT or Wall received any actual or constructive notice of this lawsuit before being

served with the amended complaint, and TWT and Wall contend that they had no notice of the proceedings prior to being named as defendants in the suit, and that they are not related or connected to the originally-named defendants. The plaintiff's accident occurred on December 20, 1990, and the amended complaint adding TWT and Wall to the suit was filed on May 18, 1992. Although Rule 15(c) was amended effective December 1, 1991, both the pre-amendment version and the post-amendment version require that a newly named defendant have received some kind of notice of the institution of the action within at least the date prescription ran or 120 days thereafter in order for an amendment changing the naming of the party against whom a claim is asserted to relate back to the date of

the original complaint. Louisiana law makes essentially the same requirement. The plaintiff has not cited any authority whatsoever in support of his contention that TWT and Wall should be held to have had knowledge of the institution of this action before they were served as defendants because they (allegedly) affixed a misleading inscription to the subject product.

For all of the foregoing reasons, IT IS RECOMMENDED that the motion to dismiss of TWT and Wall, on the ground that the plaintiff's claim has prescribed against them, be DENIED because of lack of finality of judgments dismissing all other defendants with whom they could have solidary liability to the plaintiff.

Under the provisions of 28 U.S.C. § 636(b)(1)(C), the parties have ten (10)

business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL. THUS DONE AND SIGNED at Alexandria, Louisiana, on this 15th day of November, 1993.

s/ John F. Simon
JOHN F. SIMON
UNITED STATES MAGISTRATE JUDGE

COPY SENT

DATE 11-15-93
BY TW
TO: Baldwin
Foote
Harkey
Cave

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

U.S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 21 1993
ROBERT H. SHEMWELL, CLERK
BY: s/ cag
Deputy

DEBRA HAYNES, INDIVIDUALLY
AND ON BEHALF OF
JEREMY CALHOUN,

Plaintiff

CIVIL ACTION
NUMBER 91-1516

VERSUS

ST. PAUL FIRE AND
MARINE INSURANCE
COMPANY AND DUMAS
BROTHERS MACHINE,
INC.

SECTION "M"
JUDGE WALTER

JUDGMENT

The motion for summary judgment filed by the defendant, St. Paul Fire & Marine Insurance Company, having been considered, and for the written reasons set out in the Court's Memorandum Ruling

and Order filed August 30, 1993 and reaffirmed in the Court's Memorandum Rulings and Orders filed September 24, 1993 and October 26, 1993;

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment be granted and plaintiff's suit be dismissed against the defendant, St. Paul Fire & Marine Insurance Company.

THUS DONE AND SIGNED on this 20 day of Dec., 1993.

s/
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

Approved as to form:

s/
Donald G. Cave

s/
Elizabeth Erny Foote

s/
Haynes L. Harkey, Jr.

COPY SENT
DATE12-21-93
BY cag
TO: Foote
Cave
Harkey
Baldwin

Supreme Court, U.S.
FILED
MAY 3 1995
OFFICE OF THE CLERK

NO. 94-1727

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEREMY CALHOUN,
Petitioner

VERSUS

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, TWT MOULDING, INC. AND WALL MOULDING, INC.
Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a suit for personal injuries, where the plaintiff Jeremy Calhoun admits he was working in a business owned and operated by his grandparents and where the general liability policy issued to the grandparents excluded coverage for claims by employees, was the granting of the motion for summary judgment by St. Paul Fire & Marine Insurance Company correct?

2. Where plaintiff did not file suit against defendants, TWT Moulding Company and Wall Moulding, Inc., within the one year prescriptive period and there are no other potential solidary obligors remaining in the lawsuit, was the claim against these defendants prescribed?

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STATEMENT OF THE CASE

Plaintiff's application for Writs seeks to have this Court reverse the 5th Circuit Court of Appeals' affirmation of two separate judgments which dismiss two different defendants - St. Paul Fire & Marine Insurance Company ("St. Paul") and TWT Moulding Company ("TWT") and Wall Moulding, Inc. ("Wall"). These defendants are represented by separate counsel who in the spirit of judicial and economic efficiency join together in submitting this opposition brief.

A. COURSE OF THE PROCEEDINGS AND THE DISPOSITION OF THE COURTS BELOW.

This suit arises out of injuries to Jeremy Calhoun which occurred on December 20, 1990. Jeremy, then sixteen years old, was injured while operating a double miter saw in an art and frame gallery owned by his grandparents, Jerry and Helen Haynes. Suit was filed on July 22, 1991 by Debra Haynes, Jeremy's mother, individually and on behalf of the minor.

Originally named as defendants in this Complaint were St. Paul Fire & Marine Insurance Company, as the general liability carrier for the frame shop, and Dumas Brothers Machine, Inc., as the alleged manufacturer.

TWT and its successor in business, Wall, were impleaded as third party defendants on April 22, 1992. Plaintiff then amended her Complaint on May 5, 1992 to "substitute" TWT and Wall as defendants in the place of Dumas Brothers. Service on these defendants was made on May 29, 1992. In the meantime, on May 18, 1992, having reached the age of majority, Jeremy Calhoun substituted himself as plaintiff. Unsure of the procedural capacity in which they were placed by the voluntary "substitution" of defendants by the plaintiff, Dumas Brothers Machine, Inc. filed a motion for summary judgment on May 5, 1992. This motion was granted, and this defendant was dismissed without prejudice on March 3, 1993. No appeal was taken by plaintiff as to this dismissal.

By motion dated June 24, 1993, St. Paul filed a motion for summary judgment on the grounds that

because the plaintiff was an employee, no coverage was afforded to him under the comprehensive general liability policy which had been issued to Jerry and Helen Haynes d/b/a Haynes Gallery of Monroe. In support of the motion for summary judgment, St. Paul filed the following exhibits:

(1) The deposition of Jeremy Calhoun, pages 13 through 46;

(2) The deposition of Helen Haynes (grandmother), pages 16 through 35;

(3) The deposition of Jessie Calhoun (brother to Jeremy), pages 11 through 20; and

(4) A certified copy of the liability insurance policy issued by St. Paul to Jerry Haynes and Helen Haynes, d/b/a Haynes Gallery of Monroe.

The only countervailing affidavit originally filed by the plaintiff in opposition to the motion for summary judgment was an "Affidavit of Jeremy Calhoun" dated July 28, 1993. Importantly, in the affidavit it is not denied that Jeremy was an employee of the frame shop. Indeed, Jeremy admits in the affidavit that he worked at the frame shop and was paid $3.00 an hour when he worked. The affidavit also states that Jeremy

did not receive any worker's compensation benefits as a result of the accident.

On August 28, 1993, Judge Donald E. Walter issued a memorandum ruling and order granting St. Paul's motion for summary judgment. The judgment was entered on August 30, 1993.

By motion dated September 7, 1993, the plaintiff moved for reconsideration of the summary judgment in favor of St. Paul on the basis that the plaintiff had submitted a reply memorandum on August 25, 1993 which was not received by the court until August 27, 1993. Plaintiff alleged that the court rendered its decision prior to its receipt of the reply memorandum and requested that the court reconsider its decision in light of that reply memorandum. No further evidence was submitted by the plaintiff.

In a memorandum ruling and order dated September 24, 1993, the court denied the motion to reconsider. In doing so, Judge Walter noted that not only was he unsure of the procedural propriety of plaintiff's "reply memorandum", but that he had considered all submissions by both plaintiff and

defendants and was convinced that his original ruling was correct.

In October, 1993, the plaintiff filed a "Second Motion to Reconsider." At that time, the plaintiff submitted an affidavit executed by Durwood Kuhn. Mr. Kuhn stated that he was the accountant for Jerry and Helen Haynes and Haynes Gallery and prepared their tax returns from 1967 through 1990. He stated that Jeremy Calhoun did not receive a W2 or a 1099 in the year of 1990. On October 25, 1993, Judge Walter in a memorandum ruling and order denied the second motion noting:

> As set out in the original order of this court, there is no question as to the fact that Jeremy worked at the Gallery, was given Gallery-related duties to perform, and was paid regularly based solely on the amount of hours he spent at the Gallery, less any advances. He was an employee of the Gallery.

A judgment dismissing St. Paul's claim was signed December 17, 1993 and entered December 20, 1993. The plaintiff appealed via a Notice of Appeal filed January 10, 1994.

In the meantime, the court had issued a scheduling order fixing the deadline to file dispositive motions as October 1, 1993. Because of the drawn-out nature of the opposition to the motion for summary judgment filed by St. Paul, TWT and Wall filed a motion to extend this deadline. The court granted this motion extending the deadline for dispositive motions to October 15, 1993. By this date, as noted above, the court had already issued two memorandum rulings and orders dismissing St. Paul's claim or, more correctly stated, dismissing the claim and denying the motion to reconsider that dismissal. It is admitted that the judgment actually dismissing St. Paul's claim was not signed until December of 1993.

However, in order to comply with the scheduling order, TWT and Wall filed a motion to dismiss on October 14, 1993 on the grounds that the plaintiff's claim was prescribed against these remaining defendants on the face of the record alone. Importantly, the plaintiff opposed this motion to dismiss by memorandum alone. No evidence was submitted

by plaintiff in opposition to the motion to dismiss based upon prescription.

In his brief to this Court, plaintiff quotes the alleged content of the machine's label as well as alleged facts as to the machine's manufacturer and the alleged relationship between Dumas Brothers and TWT and Wall. No such evidence was submitted by plaintiff in the trial court.

The Magistrate Judge (Magistrate Judge John F. Simon) issued a recommendation on November 15, 1993. Contrary to statements made in the plaintiff's brief, the Magistrate Judge agreed with TWT and Wall that once St. Paul and Dumas Brothers had been dismissed, the claims against TWT and Wall were prescribed. However, the Magistrate Judge noted that the judgment dismissing Dumas Brothers had not been certified in accordance with Rule 54(b) of the Federal Rules of Civil Procedure. In fact, Judge Walter had declined to so certify Dumas Brothers' judgment of dismissal upon what, in hindsight, was the ill-considered motion of these defendants. Secondly, Magistrate Judge Simon noted that there had been no

judgment of record dismissing the plaintiff's claim against St. Paul. In summary, it was the position of the Magistrate Judge that because neither of the judgments dismissing the other potential solidary obligors had been certified in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, then the motion to dismiss based upon prescription by TWT and Wall was procedurally premature, although substantively correct.

As stated above, the judgment dismissing St. Paul subsequently was filed of record. In the meantime, written objections to the proposed recommendation on the motion to dismiss were filed by these defendants.

On January 5, 1994, Judge Donald E. Walter entered a minute entry of the court certifying the judgment dismissing Dumas Brothers in accordance with Rule 54(b). On January 11, 1994, TWT and Wall filed a motion for 54(b) certification of the St. Paul judgment.

On January 13, 1994, the court in its own order granted the motion to dismiss filed by TWT and Wall.

On the same day, the court returned the order attached to defendants' motion for entry of final judgment pursuant to Federal Rule of Civil Procedure 54(b) as to the St. Paul judgment indicating that same was moot. Plaintiff timely appealed that motion.

In summary, there were two judgments of dismissal before the Fifth Circuit on two different grounds from which the plaintiff sought relief. The Fifth Circuit Court of Appeals in an unpublished opinion affirmed the trial court's decision as to both judgments. Plaintiff seeks review by this Court of that decision.

B. STATEMENT OF THE FACTS

As all parties concede, Jeremy Calhoun was injured while operating a double miter saw used solely to manufacture picture frames while working in the art gallery and frame shop owned by his grandparents and known as Haynes Gallery of Monroe. Furthermore, it is undisputed that St. Paul Fire & Marine had issued a comprehensive general liability policy to that gallery insuring the owners

against claims by third parties within the limits of the policy.

SUMMARY OF THE ARGUMENT

The plaintiff, Jeremy Calhoun, was injured while he was working in a frame shop and art gallery owned and operated by his grandparents. Because Jeremy Calhoun was rendering services in his grandparents' business, he is presumed to be an employee of that business under the Louisiana Worker's Compensation Act. Jeremy Calhoun was paid wages for the work he performed at the gallery at the rate of $3.00 per hour. He was paid these wages whether he lived with his grandparents or whether he lived elsewhere. Jeremy Calhoun's work was under the direction of his grandfather, grandmother and father. As Jeremy, himself, expressed it, his job was not a "free ride". The wages Jeremy Calhoun received were directly tied to the amount of hours he worked at the gallery. Thus, there are no issues of material fact that Jeremy Calhoun was an employee of the business owned and operated by his grandparents.

The defendant, St. Paul, issued a comprehensive general liability policy to the Haynes business enterprise. This policy contained exclusions for claims made by employees as well as for any obligations under worker's compensation or similar laws. The injuries suffered by Jeremy Calhoun in his capacity as an employee of his grandparents' business is specifically excluded from the liability coverage provided by St. Paul's insurance policy. These exclusions contained within the St. Paul policy are applicable in this case whether or not worker's compensation benefits are available to Jeremy Calhoun. Jeremy's argument that he was illegally employed in violation of the Child Labor law and, therefore, covered by the CGL policy is without merit. Not only does the argument come too late, it also misses the point. The issue before the Court is not whether he had a claim against his grandparents because they employed him in violation of the Child Labor Law. Rather, the issue is whether he falls within the exclusion of the CGL policy. His decision to sue in

tort did not change or eliminate the exclusions in the policy for injuries "to any employee."

The District Court's decision that Jeremy was an employee of the gallery at the time of his accident and, therefore, excluded from the coverage afforded by the St. Paul CGL policy was correct. The decision was affirmed summarily on appeal.

Jeremy Calhoun was injured on December 20, 1990. At the time of his accident, Louisiana law provided that Jeremy Calhoun's representative had one year from this date to file suit in order to recover for his injury. Suit was instituted within this period against Dumas Brothers and St. Paul. After this prescriptive period had run, however, TWT and Wall were "substituted" as defendants in the place of Dumas Brothers. Because TWT and Wall were sued after the prescriptive period had run, the plaintiff bears the burden of proving that prescription was somehow interrupted in order to maintain his action against these defendants. No evidence was introduced by the plaintiff in opposition to the motion to dismiss based on prescription.

While Dumas Brothers and St. Paul could be considered solidary obligors with TWT and Wall in order to interrupt prescription, Dumas Brothers and St. Paul have been dismissed and can no longer be held solidarily liable with TWT and Wall. Therefore, there is no longer any basis upon which prescription was interrupted as to TWT and Wall, and the action against these defendants has prescribed.

The plaintiff asserts that a 1992 amendment to the applicable prescription statute suspended the prescriptive period against Jeremy Calhoun in this suit. However, this 1992 amendment cannot be retroactively applied for it would revive an already prescribed cause of action. Retroactive application of this amendment would disturb TWT and Wall's vested right to raise the issue of prescription.

Secondly, the plaintiff refers in his brief to certain mitigating facts which he wants this court to consider in deciding the prescription issue. The plaintiff did not seek to introduce any such evidence in the trial court. Therefore, despite plaintiff's attempts to raise these controverted facts on appeal, these facts

are not before this court. The Fifth Circuit summarily affirmed the trial court's dismissal of TWT and Wall on the grounds of prescription.

ARGUMENT

I. THE DEFENDANTS OPPOSE THE APPLICATION FOR WRIT OF CERTIORARI BY THE PLAINTIFF, JEREMY CALHOUN, BECAUSE THIS MATTER IS NOT APPROPRIATE FOR REVIEW UNDER THE CONSIDERATIONS GOVERNING REVIEW BY THE UNITED STATES SUPREME COURT.

The plaintiff, Jeremy Calhoun, has petitioned for a writ of certiorari to this Court seeking the review of a decision rendered by the U.S. Fifth Circuit Court of Appeals on December 12, 1994. In this opinion, the Fifth Circuit affirmed two judgments: a judgment granting summary judgment to St. Paul and a judgment dismissing TWT and Wall from the suit.

Rule 10 of the Rules of the Supreme Court state the considerations governing the U.S. Supreme Court's review of writs of certiorari. This Rule lists three criteria used in the decision on whether to grant writs, as follows:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United State court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court.

The case at bar is a suit based upon diversity jurisdiction, and therefore involves a determination of state law. As considerations (b) and (c) concern only those cases involving federal questions, these reasons do not provide support for Jeremy Calhoun's petition for writ of certiorari. The only consideration

which could possibly be applicable to the case at bar is those reasons listed in (a). This consideration, however, is also inapplicable, because there is no conflict between any United States Courts of Appeals in this matter. Nor has the United States Fifth Circuit Court of Appeals decided a federal question in conflict with a state court of last resort. This matter involved only an interpretation of Louisiana law. Thus, the considerations utilized by this Court in reviews on writ of certiorari do not dictate supervisory review in this matter.

In fact, the United States Court of Appeals for the Fifth Circuit expressly determined that the opinion it rendered in this case should not be published in accordance with a local rule, Local Rule 47.5. That rule provides:

> The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.

This determination by the Fifth Circuit that this appeal was decided on the basis of well-settled principles

further demonstrates that this matter is not appropriate for an exercise of the U.S. Supreme Court's power of supervision. Accordingly, the plaintiff's petition for a writ of certiorari should be denied.

II. THE POLICY ISSUED BY ST. PAUL FIRE & MARINE INSURANCE COMPANY TO JERRY AND HELEN HAYNES D/B/A HAYNES GALLERY OF MONROE EXCLUDED COVERAGE FOR THE INJURIES TO JEREMY CALHOUN, AND THEREFORE SUMMARY JUDGMENT DISMISSING ST. PAUL WAS PROPERLY GRANTED.

It is undisputed that the plaintiff, Jeremy Calhoun, was injured while he was working in a frame gallery owned and operated by his grandparents. In this capacity, Jeremy Calhoun is presumed to be an employee of his grandparents' business. St. Paul Fire & Marine Insurance (hereinafter referred to as "St. Paul") issued a comprehensive general liability policy to the Haynes' business enterprise. This policy contained exclusions for claims made by employees as well as for any obligations under worker's compensation or similar laws. Because Jeremy Calhoun was an employee of his grandparents'

business when he was injured and St. Paul's insurance policy excludes these types of claims, summary judgment dismissing St. Paul was proper.

A. The plaintiff, Jeremy Calhoun, was an employee of Jerry and Helen Haynes when he suffered an injury to his left hand.

A person rendering services for another in any trade, business or occupation covered by the Worker's Compensation Act is presumed to be an employee under that Act. Louisiana Revised Statutes 23:1044. Jurisprudence under this statute places the burden of proof upon the person who contends that they are not an employee. Bellard v. Delta Polymers, Inc., 413 So.2d 269, 270 (La.App. 3rd Cir. 1982). Accordingly, Jeremy Calhoun is presumed under the Louisiana Worker's Compensation Act to be an employee of his grandparents' business. The very fact that he was rendering services in the business raises the presumption that Jeremy was an employee of his grandparents' business. The jurisprudence in Louisiana outlines four primary evidentiary factors in the determination of an employer-employee

relationship. These are: (1) selection and engagement; (2) payment of wages; (3) power of dismissal; and (4) power of control. St. Paul Fire & Marine Ins. Co. v. Richard, 208 So.2d 35, 36 (La.App. 3rd Cir. 1967), writ denied, 210 So.2d 54 (1968).

In Arnold v. McConnel, 424 So.2d 402 (La.App. 2nd Cir. 1982), the court summarized how an employer-employee relationship arises under the worker's compensation act as follows:

> A person may become an employee within the meaning of our Worker's Compensation Act if he is performing a service for another with the latter's consent and subject to his control or direction. No formal contract between the two is necessary and there need be no specific agreement as to how much is to be done or how long the arrangement shall continue. It is not required that the amount or terms of payment be settled, so long as the circumstances fairly indicate that the services were not intended as a gratuity and both parties understood that payment was to be made therefor.
>
> 424 So.2d at 404 (citations omitted).

All of the factors for an employment relationship outlined above are met in the case at bar.

Jeremy was paid wages for the work he performed at the rate of $3.00 per hour. (Deposition of Jeremy Calhoun, p. 21). The number of hours Jeremy worked was recorded on a time card. As he became more responsible Jeremy was able to make more money by working more hours. (Depo. p. 26). If Jeremy did not work, he did not get paid. (Depo. p. 23). Thus, the amount of wages Jeremy received was determined solely by the number of hours he worked. Jeremy was paid these wages whether he lived with his grandparents or whether he was living elsewhere. (Depo. p. 27). If Jeremy's grandmother purchased clothes for him, he paid for these clothes either out of the money he earned at the shop or through a deduction from his wages. (Depo. p. 27). His work was under the direction of his grandfather, grandmother and father. As Jeremy, himself, expressed it, his job was not a "free ride." (Depo. p. 26).

The above facts, to which there was no contradictory evidence offered by the plaintiff, clearly indicate that Jeremy Calhoun was an employee of the

gallery under both Louisiana statutory law and jurisprudence. Therefore, there is no issue of material fact that Jeremy Calhoun was an employee of the business owned and operated by his grandparents.

The plaintiff argues that the mere fact that Jeremy's services were rendered for his grandparents in a business owned and operated by them somehow prevents him from being an employee within the meaning of the Worker's Compensation Act. Louisiana jurisprudence, however, has found an employee relationship in familial settings under facts less clear than those in the case at bar.

An employment relationship was found between a father and son in St. Paul Fire & Marine Ins. Co. v. Richard, 208 So.2d 35 (La.App. 3rd Cir. 1967). In Richard, the plaintiff was injured while operating a tractor on land planted by his son. The son conducted a farming operation in which he leased about 238 acres from others and used this land to plant rice. Sixty-five of those acres was leased from the plaintiff. The employment agreement between the father and son was that they would exchange labor at the rate of

$6.00 per day. However, no sums of money had ever actually exchanged hands between the parties for several years. The third circuit held that a contract of employment existed between the father and son. The court considered the father's services to be an exchange of labor and not a gratuity from the father to his son. Additionally, the court found it important that the father was working on his son's separate farming operation over which the son had exclusive control.

A fifteen-year-old was also found to be an employee of his uncle's company in Beard v. Wilson Wholesale Distributors, Inc., 215 So.2d 664 (La.App. 1st Cir. 1968). Here, the fifteen-year-old went to his uncle's business seeking temporary employment during the Christmas holidays. Prior to this time, the uncle had employed the fifteen-year-old on a part-time basis doing odd jobs whenever needed. On the morning of the accident, the fifteen-year-old spoke to the assistant manager and inquired about employment. The fifteen-year-old was told that his services were not needed that day. In any event, the fifteen-year-old remained on the premises. Shortly

thereafter, a thunderstorm occurred causing water to leak through holes in the roof of a new addition to the business establishment. The assistant manager sought help from his employees in covering the roof to prevent leakage. The assistant manager also sent the fifteen-year-old to the warehouse with the other employees. The employees were instructed to get on the roof and cover the holes with visqueen. During this procedure, the fifteen-year-old fell from the roof and was injured. On appeal, the first circuit had to determine whether the fifteen-year-old was an employee of the company when he was injured. Stating that the Worker's Compensation Act should be liberally construed, the court held that the fifteen-year-old was an employee of his uncle's business at the time of the accident.

The plaintiff contends that Jeremy Calhoun is not an employee of the business, because the money Jeremy received was merely an allowance and not actual wages. In support of this proposition, the plaintiff cites Caldwell v. Caldwell, 55 So.2d 258 (La.App. 2nd Cir. 1950). In Caldwell, the second

circuit found that the plaintiff was not an employee of his father's concrete products manufacturing plant because the weekly wage the son received was a fixed weekly allowance. One of the reasons for the court's decision was that there was no evidence of payment to other employees in the payroll records for the company at the same time that wages were paid to the son. The court specifically stated, however, that such a relationship can exist between a father and son, as follows:

> We have not stated, nor do we here hold, that a contract of hiring between a father and his minor son cannot exist under circumstances that would bring the employment under the provisions of the Workmen's Compensation Act.
>
> 55 So. 2d at 264.

The plaintiff also cites Arnold v. McConnel, 424 So.2d 402 (La.App. 2nd Cir. 1982). Here, the court found that a minor was not an employee of his stepfather, because the minor was not paid anything in addition to his regular allowance for his assistance to his stepfather in picking up hay. No employment

relationship was present, because neither party expected payment for the work performed by the son.

Jeremy Calhoun's situation is clearly different from that in Arnold and Caldwell. Unlike the plaintiffs in Caldwell and Arnold, Jeremy Calhoun's wages were directly tied to the amount of hours he worked at the gallery. This fact is undisputed by the plaintiff. Furthermore, Jeremy Calhoun did not receive money unless he did some work for his grandparents. In Arnold, the stepson received his regular allowance whether or not he assisted in picking up the hay.

The plaintiff also argues that he is not an employee of his grandparents' business, because he was not paid for the work he performed during the week before the accident and the day of the accident. However, defendants submit that the actual payment of wages is irrelevant. Instead, the question is whether the parties understood or expected that payment would be made. It is certainly reasonable to conclude that Jeremy Calhoun did not receive any wages for the preceding week and the day of his accident because his grandparents and he, himself,

were preoccupied with his medical condition at this time.

B. The insurance policy issued by St. Paul to the Haynes Gallery excludes coverage for any injury suffered by Jeremy Calhoun.

The insurance policy issued by St. Paul to Jerry Haynes and Helen Haynes in their business provides coverage which includes commercial general liability protection. Among the exclusions in the policy are exclusions regarding employer's liability. First, this policy excludes:

> bodily injury to any employee of the protected person for which the protected person may be held liable as an employer or any other capacity . . .

Additionally, the policy excludes liability for worker's compensation obligations as follows:

> WORKER'S COMPENSATION. We won't cover any obligation that the protected person has under worker's compensation, disability benefits or unemployment compensation law, or any similar law.

Jeremy Calhoun was injured while he was an employee of the gallery, and therefore, the exclusions

set forth in St. Paul's general liability policy prevent him from recovering for those injuries under that insurance policy.

The jurisprudence generally holds that a comprehensive general liability policy, such as St. Paul's, does not apply to a claim for personal injuries by an employee of the insured. For example, in Jones v. Thomas, 557 So.2d 1015 (La.App. 4th Cir. 1990), the fourth circuit referred to similar language and concluded that an injury sustained by an employee was not covered by the comprehensive general liability policy at issue. Moreover, the court found no merit to the plaintiff's contention that the exclusions were ambiguous. The court further commented on the purpose behind these types of policies as follows:

> The purpose of a comprehensive general liability policy is to provide coverage for injuries to third persons only -- this being the very reason for the exclusions. This conclusion is supported by the testimony of insurance expert, Robert Breeden. He testified that the type of injury sustained by Jones is covered by a Worker's Compensation/Employer's Liability policy and is never covered by a Comprehensive General liability policy

> which is the very reason for the exclusions in question.
>
> 557 So.2d at 1019.

The same result was reached in Fidelity & Guar. Ins. v. City of Kenner, 894 F.2d 782 (5th Cir. 1990). Here, the comprehensive general liability insurer brought a declaratory judgment action to determine whether it had the duty to defend a third party suit against its insured, the City of Kenner. The third party suit was filed against the City by present and former employees of the Kenner Police Department. Fidelity's policy provided basic comprehensive general liability coverage to the City. One of the exclusions of the policy provided that the insurance did not apply to bodily injury to any employee of the insured. The court held that the complaint unambiguously excluded coverage for the City because the policy did not apply to injuries sustained by employees of the insured arising out of their employment. Thus, Fidelity was under no obligation to defend the City in the suit.

Likewise, the policy issued by St. Paul to Jerry and Helen Haynes does not apply to any injury

sustained by one of their employees, Jeremy Calhoun. As established above, Jeremy Calhoun was an employee of his grandparents' business. In this capacity, Jeremy Calhoun suffered an injury. This injury, however, is specifically excluded from the liability coverage provided by St. Paul's insurance policy. The purpose of St. Paul's policy was to provide coverage for injuries to third persons. Jeremy Calhoun is not considered a third person under this policy. Instead, Jeremy Calhoun is an employee and cannot receive benefits based on the clear language of the policy.

The plaintiff argues that Jeremy Calhoun did not receive worker's compensation benefits for his injury and, therefore, the employee exclusion under the St. Paul policy does not apply. Whether or not Jeremy Calhoun received worker's compensation benefits or even has a claim for worker's compensation benefits against the business is irrelevant to the question of coverage.

This situation was addressed by the Louisiana Supreme Court in Spain v. Traveler's Ins. Co., 332

So.2d 827 (La. 1976). In Spain, a legal secretary was injured while riding as a passenger in an automobile which was owned and being driven by the attorney by whom she was employed. The plaintiff and her employer were returning from a work related conference. The question before the court was whether the policy issued by Traveler's excluded coverage for the plaintiff's injuries. The automobile liability policy stated that coverage did not apply to injuries to any employee of the insured:

> arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured. . . .

The trial court considered the exclusion to only be applicable if the employee was not eligible for worker's compensation benefits. At the time of this case, worker's compensation benefits only extended to hazardous occupations. The trial court then concluded that because the plaintiff was not engaged in a hazardous occupation, she was not eligible for

worker's compensation benefits and, therefore, the exclusion was not applicable. The court of appeal reached the same result finding that the exclusion was ambiguous and, therefore, invalid. However, the Louisiana Supreme Court disagreed, stating:

> We cannot subscribe to the rationale employed by either court below. The exclusion is neither ambiguous as found by the court of appeal nor susceptible to the strained interpretation given it by the trial court. A reading of the exclusion, particularly in light of the numbering used to set off the clauses therein, leaves no doubt as to its meaning: All employees of an insured injured in the course and scope of their employment are excluded from coverage under the policy unless they are domestic employees who are not covered by workmen's compensation.
>
> 332 So.2d at 830.

Accordingly, the court held that the exclusion relieved the defendant of any liability to the plaintiff. More importantly, the Louisiana Supreme Court specifically rejected the very argument that the plaintiff in this case is asserting. According to the Louisiana Supreme Court, the eligibility of an employee for worker's

compensation benefits is irrelevant to the enforceability of an exclusion.

The plaintiff also argues that there is disagreement among the Louisiana appellate courts about the Louisiana Child Labor Law and that this law allows Jeremy Calhoun to sue his grandparents' liability carrier for negligence. Yet, the question of whether or not Jeremy Calhoun has a claim against his grandparents under these Louisiana statutes is irrelevant to the question of coverage under the comprehensive general liability policy issued by St. Paul. That policy, as stated above, excludes all claims by employees for personal injuries. The cases cited by the plaintiff in support of this proposition simply describe what possible causes of action a plaintiff might have under the statute if in fact the statute factually applied to them. These cases do not deal with the issue of insurance coverage and are, therefore, inapplicable.

III. ANY CLAIMS AGAINST TWT MOULDING COMPANY AND WALL MOULDING, INC. BY JEREMY CALHOUN HAVE PRESCRIBED,

BECAUSE THE PLAINTIFF DID NOT FILE SUIT WITHIN THE ONE-YEAR PRESCRIPTIVE PERIOD, THERE ARE NO OTHER POTENTIAL SOLIDARY OBLIGORS REMAINING IN THE LAWSUIT, AND THE 1992 AMENDMENT TO THE PRESCRIPTION STATUTE CANNOT APPLY RETROACTIVELY.

The plaintiff, Jeremy Calhoun, was injured on December 20, 1990. His representative had one year from the date of his injury, until December 20, 1991, to file suit against the defendants. Suit was instituted within this period against defendants, Dumas Brothers and St. Paul. After this prescriptive period had run, however, TWT and Wall were added as defendants. The original named defendants are no longer involved in this suit, having been dismissed by separate judgments. Thus, there are no defendants with whom TWT and Wall can be potentially solidarily liable. Because TWT and Wall were not named as defendants until more than one year from the date of the accident and there is no potentially solidary defendant remaining, Jeremy Calhoun's claim has prescribed.

A. Prescription was not interrupted as to TWT and Wall, since these defendants were not sued timely

and Dumas and St. Paul cannot be liable to the plaintiff.

At the time of Jeremy Calhoun's accident, La. Civ. Code art. 3492 provided the prescriptive period for delictual actions as follows:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

Additionally, La. Civ. Code art. 3468 governs the issue of prescription as to minors as follows:

> Prescription runs against absent persons and incompetents, including minors and interdicts, unless exception is established by legislation.

Accordingly, the prescriptive period of one year for delictual actions established under La. Civ. Code article 3492 runs against the minor in this suit, Jeremy Calhoun, during the period of his minority. Because Jeremy Calhoun was injured on December 20, 1990, his representative had one year from the date of his injury to file suit in order to recover for his injury. Jeremy's representative did file suit within this period on July 22, 1991. Named as defendants in this complaint were St. Paul and Dumas Brothers. After

the prescriptive period had run, however, the plaintiff amended her complaint to "substitute" TWT and Wall as defendants in the place of Dumas Brothers. Thus, the plaintiff must present some basis upon which prescription was interrupted as to TWT and Wall in order to maintain the action against these defendants.

It is well settled that suit against one solidary obligor interrupts prescription as to other solidary obligors. La. Civ. Code arts. 1799 and 3503. Thus, the filing of suit against Dumas and St. Paul interrupted prescription as to TWT and Wall. However, both the Louisiana state courts and the United States federal courts have consistently held that while prescription is interrupted against solidary obligors, prescription is not interrupted as to an untimely sued defendant where the timely sued defendant was ultimately found not liable. See, e.g., Smith v. Xerox Corporation, 718 F.Supp. 494 (E.D. La. 1989); Younger v. Marshall Industries, Inc., 618 So.2d 866 (La. 1993) (where evidence did not establish that treating physician was solidary obligor with hospital for injuries sustained by plaintiff, then timely filing of

suit against treating physician would not interrupt prescription as to claim against hospital); Spott v. Otis Elevator Company, 601 So.2d 1355 (La. 1992).

Accordingly, Dumas Brothers and St. Paul have been dismissed and can no longer be held solidarily liable with TWT and Wall. Thus, prescription was not interrupted by the timely filing of suit against Dumas Brothers and St. Paul, and the action against TWT and Wall has prescribed.

B. The 1992 Amendment to La. Civ. Code art. 3492 cannot be retroactively applied to Jeremy Calhoun's suit for retroactive application would revive an already prescribed cause of action.

In 1992, after Jeremy Calhoun had reached the age of majority and after TWT and Wall had been sued and served, a third sentence was added to La. Civ. Code art. 3492 which presently reads as follows:

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products

> Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

This amendment became effective on August 21, 1992. This amended version of La. Civ. Code art. 3492 is not applicable to this suit.

The general rule is that prescription statutes are remedial in nature and are generally accorded retroactive application. Lott v. Haley, 370 So.2d 521, 523 (La. 1979). There are two situations, however, where prescription statutes are not retroactively applied: (1) where retroactive application would strip a party of a vested right or (2) where retroactive application would revive an already prescribed cause of action. LeBlanc v. City of Lafayette, 558 So.2d 259, 262 (La.App. 3rd Cir. 1990). Both of these exceptions are applicable in the case at bar, and, therefore, the 1992 amendment to Louisiana Civil Code article 3492 cannot be retroactively applied.

First, retroactive application would revive Jeremy Calhoun's already prescribed cause of action. The Louisiana Supreme Court recently ruled that this amendment to La. Civil Code art. 3492 could not be

retroactively applied in Chance v. American Honda Motor Company, Inc., 635 So.2d 177 (La. 1994). Here, an eleven-year-old was injured on October 25, 1987 while riding a three-wheeled vehicle manufactured by Honda. A products liability action was filed for these injuries on December 17, 1992. Honda filed an exception of prescription. The trial court denied this exception relying upon the 1992 amendment to La. Civ. Code art. 3492. Honda applied for supervisory writs, and the court of appeal held that the 1992 amendment could not be applied retroactively to revive the plaintiff's already prescribed cause of action. 624 So.2d 23 (La.App. 3rd Cir. 1993). The Louisiana Supreme Court granted certiorari to review the appellate court's decision. The supreme court found no expression of legislative intent to revive prescribed claims and declined to apply the statute retroactively.

Likewise, the 1992 amendment to La. Civ. Code art. 3492 should not be applied retroactively in this case to revive Jeremy Calhoun's already prescribed cause of action. Instead, the previous

version of this article applies and provides a one year prescriptive period with no suspension during minority. Therefore, Jeremy Calhoun, through his proper representative, had one year from the date of his accident in which to bring suit against TWT and Wall. By failing to file suit against these defendants until more than one year after the accident, Jeremy Calhoun's claim has prescribed.

The plaintiff ignores the clear holding against retroactive application by the Louisiana Supreme Court in Chance. Instead, he contends that TWT and Wall did not have the right to plead prescription because prescription had already been interrupted against them. Because of his allegations of solidary liability with the other defendants in his suit against TWT and Wall, the plaintiff argues that, therefore, retroactive application of the 1992 amendment would not revive an already prescribed cause of action. There are several flaws in this reasoning.

The first flaw is in the overly broad way the plaintiff views the term "cause of action". The Louisiana Supreme Court has defined "cause of

action" as "an act by a defendant which gives a plaintiff a right to invoke judicial interference on his behalf." Trahan v. Liberty Mutual Insurance Company, 314 So.2d 350, 353 (La. 1975). The supreme court further stated that "a cause of action in tort has no identity independent from the defendant upon whose fault it is based." Id. The Louisiana Supreme Court's definition of "cause of action" is defendant specific. This defendant-specific view of "cause of action" was recently reaffirmed in Everything on Wheels v. Subaru South, 616 So.2d 1234, 1238 (La. 1993), where the court defined "cause of action" as the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant.

Accordingly, Jeremy Calhoun's cause of action must be defined in terms of specific defendants. In particular, the plaintiff's cause of action must be stated in connection with TWT and Wall. The question to be answered in this case, therefore, is whether retroactive application of the 1992 amendment would revive Jeremy Calhoun's already prescribed cause of action against TWT and Wall.

This question must be answered in the affirmative. Jeremy Calhoun was injured on December 20, 1990. His representative had one year from the date of his injury, until December 20, 1991, to file suit against the responsible parties. TWT and Wall were sued by the plaintiff on May 5, 1992. By this date, Jeremy Calhoun's cause of action against TWT and Wall had already prescribed. Retroactive application of the 1992 amendment would revive the plaintiff's cause of action against these defendants.

The second flaw in Jeremy Calhoun's reasoning is in his assertion that the timely filing of suit against Dumas Brothers and St. Paul interrupted prescription as to other potential solidary obligors. Here, solidary liability does not exist. The plaintiff mistakenly believes that mere allegations of solidary liability somehow prevent his cause of action against TWT and Wall from becoming "an already prescribed cause of action."

The plaintiff is correct in his assertion that suit against one solidary obligor interrupts prescription as to other solidary obligors. What the plaintiff ignores,

however, is the fact that prescription is not interrupted where a timely-sued defendant is ultimately found not to be liable or where solidary liability is ultimately found not to exist. See, e.g., Picone v. Lyons, 601 So.2d 1375 (La. 1992) (allegations that late-named defendants are solidarily liable for the plaintiff's injuries interrupted prescription only if defendants were ultimately found to be solidarily liable); Spott v. Otis Elevator Company, 601 So.2d 1355 (La. 1992) (plaintiff may not rely on solidary liability to interrupt prescription as to late-named defendant where timely-sued defendant was ultimately found not liable.); Provident Life & Accident Insurance v. Turner, 582 So.2d 250 (La.App. 1st Cir. 1991) (if solidary liability is alleged and not actually proven, then exception of prescription should be maintained as to late-named defendant at that time).

Likewise, Jeremy Calhoun's unproven allegations of solidary liability cannot serve as an interruption of prescription in his cause of action against TWT and Wall. While Jeremy Calhoun may have alleged solidary liability, this solidary liability has

clearly not been established due to the dismissal of the timely-sued defendants, Dumas Brothers and St. Paul. Thus, prescription was never interrupted as to TWT and Wall, and Jeremy Calhoun's cause of action against these defendants has prescribed.

The plaintiff also erroneously assumes that TWT and Wall obtained the right to plead prescription after the dismissal of Dumas Brothers and St. Paul, the timely-sued defendants, and after La. Civil Code art. 3492 had been amended. Instead, the right to plead prescription was obtained by TWT and Wall upon the expiration of the applicable one-year prescriptive period.

The point at which the right to plead prescription becomes fixed was explained by the Louisiana Supreme Court in Chance as follows:

> For while the defendant does not acquire anything during the running of the prescriptive period, once the time period has elapsed, the legislature grants the defendant the right to plead the exception of prescription in order to defeat the plaintiff's claim. Because the defendant acquires the right to plead the exception of prescription, a change in that right constitutes a substantive

> change in the law as applied to the defendant. Thus, were we to interpret the amendment at issue to allow the revival of prescribed causes of action, the substantive rights of the defendant would be materially changed because he would be stripped of this acquired defense.
>
> Chance, 635 So.2d at 178, (citations omitted, emphasis added.)

Therefore, the right of TWT and Wall to raise the defense of prescription became fixed on December 20, 1991, as soon as the one-year prescriptive period on tort claims had elapsed. After TWT and Wall acquired this right, La. Civil Code art. 3492 was amended. Retroactive application of this 1992 amendment would deprive TWT and Wall of this defense and would materially change their substantive rights.

C. Retroactive application of the 1992 Amendment would divest TWT and Wall of their vested right to plead prescription.

Retroactive application of the 1992 amendment to Louisiana Civil Code art. 3492 would also divest TWT and Wall of a vested right. The vested right in this case is the right of TWT and Wall to plead the

defense of accrued prescription. TWT and Wall acquired this right once the applicable one-year prescriptive period expired.

In the concurring opinion in Chance, Justice Hall discussed the vested right aspect of retroactivity as follows:

> Given our prior jurisprudence and the civilian teachings, I would squarely hold that the right to plead the peremptory exception of prescription is a vested right. It follows that the well-settled rule that amendments to procedural--prescription--statutes are not retroactively applied when to do so would divest vested rights applies here.

Chance, 635 So.2d at 180.

Several Louisiana decisions have also indicated that the right to plead prescription is a vested right. For example, in White v. West Carroll Hosp., Inc., 613 So.2d 150 (La. 1992) the second circuit stated:

> Extending or prolonging the period in which a suit may be brought to assert a right pertains to the remedy and does not violate a vested property right, unless the right has become perfected and fixed by the completion of the prescription at the

> time the extension of the period becomes effective.
>
> 598 So.2d at 1141, citing Splane v. Tubre, 6 So.2d 361, 363 (La.App. 1st Cir. 1984) (emphasis added).[1]

Likewise, the third circuit considered the right to the effect of prescription to become vested upon the completion of the prescriptive period in Lyman v. Town of Sunset, 567 So.2d 1171,1172 (La.App. 3rd Cir.), writ denied, 571 So.2d 648 (1990).

Although the Louisiana Supreme Court found it unnecessary to address the issue of whether or not the right to plead accrued prescription was a constitutionally vested right in White v. West Carroll Hosp., Inc., (cited in footnote number 1), that court states in Louisiana Health Service and Indem. Co. v. McNamara, 561 So.2d 712, 718 (La. 1990), that the right to assert prescription is a property right of which the defendant cannot be deprived:

> Unlike statutes of limitations at common law, which are merely procedural bars to the enforcement of obligations, civilian

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[1] White v. West Carroll Hosp., Inc., was remanded to the Second Circuit by the Louisiana Supreme Court on other grounds at 613 So.2d 150 (La. 1992).

> prescriptive periods act to extinguish the civil obligation to which they applied. The patrimony of the obligor is increased when a claim prescribes, and his right to plead prescription in defense to a claim on the obligation is itself property that cannot be taken from him. (emphasis added)

In light of the Supreme Court's pronouncements in Louisiana Health Service and Indem. Co. v. McNamara, the retroactive application of an amended prescription statute in this case would deprive TWT and Wall of a property right. Implicit in the Louisiana Supreme Court's statement is that such a retroactive application is a denial of rights under the United States and Louisiana Constitutions.

Following these decisions, the right to plead the exception of prescription is a vested right possessed by TWT and Wall. These defendants acquired this right upon the completion of the one-year prescriptive period. The subsequent amendment to La. Civil Code Art. 3492 cannot be retroactively applied to divest TWT and Wall of this right.

CONCLUSION

A. DISMISSAL OF ST. PAUL.

There is no material issue of fact respecting Jeremy's employment status at the time of his injury. The District Court was correct in its conclusion when it said:

> . . . there is no question as to the fact that Jeremy worked at the Gallery, was given Gallery-related duties to perform, and was paid regularly based solely on the amount of hours he spent at the Gallery, less any advances. He was an employee of the Gallery. p.290

It follows, therefore, that Jeremy falls within the exclusion in the St. Paul CGL policy, and the decision of the Fifth Circuit Court of Appeals affirming the trial court's dismissal of St. Paul should not be disturbed.

B. DISMISSAL OF TWT AND WALL.

Following the Louisiana Supreme Court cases, plaintiff's claim against TWT and Wall has prescribed, and was therefore properly dismissed by the trial court. The 1992 amendment to the Louisiana prescription statute cannot be applied retroactively to TWT and Wall where the accident which forms the

basis of the lawsuit occurred in 1990. Therefore, the affirmation of that dismissal by Fifth Circuit Court of Appeals should not be disturbed by this Court.

C. SUMMARY

For the above reasons, the plaintiff's application for writ of certiorari should be denied by this Court.

Respectfully Submitted,

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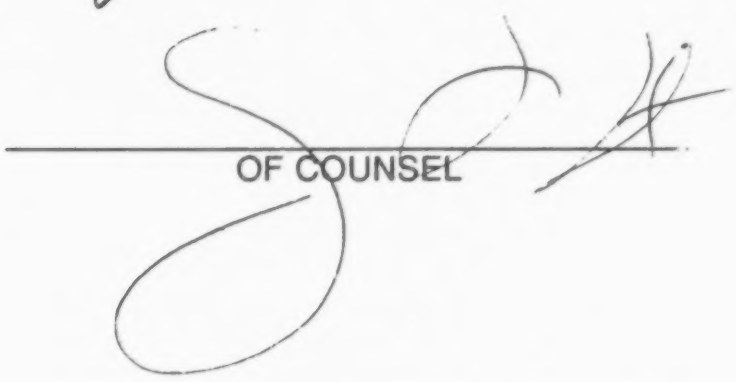
CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing Opposition to Petition for Writ of Certiorari upon Mr. Donald G. Cave, Cave & McKay, 7465 Exchange Place, Baton Rouge, Louisiana, by placing same in the United States mail, postage prepaid and properly addressed on this the 3rd day of May, 1995.



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